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No. 79-1247

In the Supreme Court of the United States

OCTOBER TERM, 1979

BOARD OF TRADE OF THE CITY OF CHICAGO,
PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 605 F.2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1979, and a petition for rehearing was denied on November 15, 1979. The petition for a writ of certiorari was filed on February 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a determination by the Commodity Futures Trading Commission that an emergency exists in a commodity futures market pursuant to Section 8a(9) of the Commodity Exchange Act, 7 U.S.C. 12a (9), is a judgment committed by law to the Commission's discretion and therefore is exempt from judicial review.

STATEMENT

1. Prior to 1974, federal oversight of the commodity futures markets was extremely limited. The Commodity Exchange Act, 7 U.S.C. (1970 ed.) *et. seq.*, placed virtually total reliance on commodity exchanges licensed as contract markets to control trading and prevent abuses in the futures markets. By 1974, Congress recognized significant deficiencies in this regulatory approach. Accordingly, Congress extensively amended the Act and created the Commodity Futures Trading Commission as an independent regulatory agency to administer and enforce the Act's provisions.[1]

The 1974 amendments granted the Commission exclusive jurisdiction to regulate futures trading as well as traditional regulatory and enforcement powers.[2] Congress also recognized, however, that effective regulation of the volatile futures markets required special administrative power. Thus, Congress

[1] The Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389.

[2] See Sections 2(a)(1), 6(b), 6b, 6c, 8a(8) and 17 of the Act, 7 U.S.C. 2, 9, 13a, 13a-1, 12a(8) and 21.

authorized the Commission under Section 8a(9) of the Act, 7 U.S.C. 12a(9):

> to direct the contract market whenever it has reason to believe that an emergency exists, to take such action as, in the Commission's judgment, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract. The term "emergency" as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity * * *.

Contract markets, like petitioner, have traditionally exercised self-regulatory emergency powers. During consideration of the 1974 amendments, however, concern was expressed to Congress that contract markets would not have been required to abide by emergency directives of the government unless Congress specifically authorized a federal agency to act as the final arbiter of market emergencies.[3] Accordingly, Congress enacted Section 8a(9) and emphasized that it intended the new emergency powers to be exercised through the "expert and impartial judg-

[3] See *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 28 (1973) (remarks of Alex C. Caldwell); *Hearings on Small Business Problems Involved in the Marketing of Grain and Other Commodities Before the Subcomm. on Special Small Business Problems of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess., 1st Sess. 367 (1973).

ment [of] the Commission." S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 38 (1974).

2. After several months of extensive surveillance of the March 1979 Wheat Futures Contract (the "Contract"), the Commission, on March 15, 1979, invoked its emergency authority under Section 8a(9). In its emergency order the Commission stated (Pet. App. A26) that it had

> reason to believe that (a) a major market disturbance, which is preventing the market for wheat from accurately reflecting the forces of supply and demand, exists * * * and (b) there exists a threatened manipulation or corner in wheat * * *.

The Commission specified seven factors that formed the basis for its determination that an emergency existed (Pet. App. A26-A27):

> (1) a small number of speculative traders has established and, as of this date, is continuing to maintain large, potentially dominant, long open positions in the Contract;
>
> (2) although only four trading days remained before expiration of trading in the Contract on March 21, 1979, this small number of speculative traders is continuing to maintain large long open positions in the Contract while at the same time other traders in the Contract are reducing their long open positions; as a result, the combined long positions of this small number of traders are comprising an increasingly large portion of the total open interest in the Contract as the last day of trading approaches, with that combined interest representing as of this date more than

> eighty percent of the total open interest in the Contract;
>
> (3) the combined long open positions presently maintained in the Contract by this small number of traders substantially exceed the total quantity of wheat currently available in positions from which delivery can be made in fulfillment of the Contract;
>
> (4) even as to wheat currently in deliverable position pursuant to the Contract, not all is acceptable or available for delivery on the Contract in that a portion of this wheat is of undeliverable variety or grade, or is owned by or committed to commercial users;
>
> (5) there is a significant shortage of transportation facilities by which additional wheat may be moved into deliverable position during March 1979, the period allowed for deliveries to be made pursuant to the Contract;
>
> (6) there is a significant shortage of warehouse facilities to accommodate any such additional wheat; and
>
> (7) there is a perceived distortion of the price relationships between the Contract and other values of wheat.

Based on these considerations, the Commission directed petitioner to suspend all trading in the Contract for the following day, Friday, March 16, 1979 (Pet. App. A27-A28). Petitioner complied with this emergency order.

On March 16, the Commission continued to review market surveillance data and urged petitioner to take effective steps to eliminate the danger of disorderly trading in, or liquidation of, the Contract. Petitioner refused to take action that was satisfactory to the

Commission. Accordingly, that evening the Commission issued a supplemental emergency order under Section 8a(9) stating (Pet. App. A29) that it

> continues to believe that an emergency, within the meaning of Section 8a(9) * * * exists with respect to the Contract, and, [that] in its judgment, further action is necessary and appropriate.

The Commission directed petitioner to take steps to achieve an orderly liquidation of the Contract by requiring settlement of all open futures positions at the settlement price established on the exchange at the close of trading on the preceding day (Pet. App. A30). The Commission's order also provided that wheat deliveries should be made in fulfillment of open positions in the Contract at that price (*ibid.*).

In both its March 15 and 16 emergency orders, the Commission expressly invited any affected person to present to the Commission any written comments, arguments or evidence concerning its orders. The Commission stated that it would afford such persons a prompt hearing (Pet. App. A28, A30).

3. Petitioner did not submit any written evidence or otherwise seek a hearing before the Commission in response to this invitation. Instead, on Saturday, March 17, 1979, petitioner brought suit in the United States District Court for the Northern District of Illinois seeking to enjoin enforcement of the Commission's March 16 order. The complaint alleged that no market emergency existed and sought judicial review of the Commission's action under the Administrative Procedure Act. On Sunday, March 18, 1979, over the Commission's objection, the district court conducted a *de novo* evidentiary hearing on the complaint. Petitioner's five witnesses did not dispute any of the factual premises on which the Commission's orders were based. Instead, these witnesses disagreed with the Commission's conclusion that an "emergency" existed and that the price of the Contract was "distorted" (Pet. App. A5-A6).

The Commission contended in the district court that judicial review of its emergency determination was not available. In the alternative, the Commission argued that judicial review should be limited to whether the Commission's emergency orders, which were introduced into evidence, expressed a rational basis for the agency's action.

The district court ruled that the Commission's emergency determination was subject to judicial review (Pet. App. A22-A23). The court expressed the view that the question whether an emergency exists in a futures market is a "garden variety factual question" (*id.* at A23). The court refused to defer to the Commission's expert judgment and concluded that "there simply isn't any evidence of an emergency" (*id.* at A24). Accordingly, the district court enjoined the Commission from enforcing its March 16 order.

The court of appeals reversed, holding that "the merits of the Commission's emergency determination are precluded from judicial review by operation of 5 U.S.C. § 701(a)(2)" (Pet. App. A16). The court observed that 5 U.S.C. 701(a)(2) provides an exception to the normal presumption in favor of judicial

review for agency action that "is committed to agency discretion by law." In light of the principles established by this Court's decisions interpreting that provision, the court of appeals determined that judicial review of Commission emergency orders is foreclosed (Pet. App. A9-A10). The court explained (*id.* at A16):

> On the basis of the language which Congress employed, the structure of the enforcement provisions of the Act, the legislative history of the Act as amended, and the nature of the Commission's determination, we conclude that Congress intended to commit a Section 8a(9) determination to the Commission's discretion.

On November 15, 1979, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. The decision does not create any conflict among the circuits because it resolves a question of first impression under a new statutory provision.[4] Moreover, the decision rests on the particular language and legislative history of the Commodity Exchange Act.

1. The Administrative Procedure Act provides that administrative action is reviewable by courts ex-

[4] The only other court to reach the issue presented here concurred "in the reasoning and the result" of the court of appeals in this case. *Equitable Trust Co.* v. *CFTC* [1977-1980] Comm. Fut. L. Rep. (CCH) ¶ 20,902 at 23,663-23,664 (W.D. Texas 1979).

cept where "statutes preclude judicial review" or the action is "committed to agency discretion by law." 5 U.S.C. 701(a)(1), (2). In construing the latter provision, the court of appeals correctly applied the principle, enunciated in the opinions of this Court, that Congress may implicitly preclude judicial review of agency action. *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

When Congress has statutorily authorized special or emergency administrative action, a congressional intent to preclude review has been discerned from the language, design, and purpose of the statute. See *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 600-602 (1950); *United States* v. *Southern Ry.*, 364 F.2d 86, 94 (5th Cir. 1966), cert. denied, 386 U.S. 1031 (1967); *Baltimore & O.R.R.* v. *Lambert Run Coal Co.*, 267 F. 776, 780-781 (4th Cir. 1920), aff'd on other grounds, 258 U.S. 377 (1922); *Daugherty Lumber Co.* v. *United States*, 141 F. Supp. 576, 581 (D. Ore. 1956). In particular, judicial review of agency action is inappropriate when the agency's determination involves the application of expertise, outside the normal scope of judicial experience, to complex economic or scientific factors,[5] or when the

[5] See, *e.g.*, *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574, 579 (3d Cir. 1979); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970); *Kletschka* v. *Driver*, 411 F.2d 436, 443 (2d Cir. 1969).

agency's exercise of discretion turns on permissive and inexact statutory terms.[6]

The authority Congress vested in the Commission under Section 8a(9) of the Act has all the characteristics of unreviewable discretionary authority. In granting the Commission emergency power, Congress recognized that the Commission would be regulating a "volatile and esoteric" marketplace (H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974)), and that the effective use of this power would therefore require the exercise of expert judgment. See S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 38 (1974). Congress also understood that emergency conditions in these markets cannot be prescribed with scientific precision. Thus, Congress chose to phrase Section 8a(9) in broad, permissive terms.

The Commission is authorized to take remedial action whenever it has "reason to believe" that an emergency exists. It may then enter an emergency order directing the contract market "to take such action as, in the Commission's judgment, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract." Section 8a(9) defines "emergency" broadly to include the mere "threat" of a manipulation or corner, as well as any "other major market disturbance."

These provisions were extensively examined by Congress in 1974. At that time, certain members of Congress warned that this authority was undesirable because the Commission could "take over the market

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[6] *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958).

if it decides trading is fluctuating too greatly." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 165 (1974) (minority views). Congress thus understood that the new provision would authorize prophylactic measures with immediate and substantial market impact. See S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 38 (1974). Accordingly, Congress eliminated from Section 8a(9) certain language that would have authorized emergency remedies in non-emergency situations. See *id.* at 37-38. Congress nonetheless determined that emergency authority committed to the agency's discretion was necessary to ensure effective federal regulation of the futures markets. See Pet. App. A16.

Contrary to petitioner's contention (Pet. 11), the definition of emergency in Section 8a(9) does not evidence Congress' intent to provide for judicial review. As the court of appeals correctly observed, the statutory definition merely indicates that "Congress carefully designated the context in which a discretionary decision could be made" (Pet. App. A12). Moreover, even if Congress had chosen to define "emergency" in less broad terms than it used in Section 8a(9), that would not suggest that the Commission's emergency determination would be subject to judicial review. Judicial review may be precluded despite a "congressional decision to spell out in some detail certain limitations on the power it was conferring on the Executive." *Schilling* v. *Rogers*, 363 U.S. 666, 675 (1960). The congressional directive is merely "designed to provide guides for the [agency],

thereby lessening the administrative burden of decision." *Ibid.*[7]

2. The court of appeals also correctly recognized that judicial review of the Commission's emergency determination would frustrate the agency's performance of its regulatory responsibilities (Pet. App. A16). If judicial review were available, contract markets, brokers, and traders all could seek to enjoin the Commission's emergency determinations. These lawsuits could result in conflicting judgments, thereby subjecting exchanges and traders to inconsistent trading requirements.[8] Judicial review also

[7] The court of appeals recognized that action committed to the sole discretion of an administrative agency is nevertheless subject to judicial review to determine whether the agency acted "in a manner plainly repugnant to its statutory authority" (Pet. App. A9 n.6). Agency action would be reviewable on that basis if it were "made in excess of its delegated powers and contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)). As the court below noted, however, "Congress authorized the Commission to make the kind of determination it made in this case" (Pet. App. A9 n.6). Compare *SEC* v. *Sloan*, 436 U.S. 103, 112, 115, 117 (1978), where the agency transgressed specific time limitations on its statutory authority.

[8] The Commission has defended against two other court challenges to its determination that an emergency exists under Section 8a(9). The first suit was filed by traders holding "long" positions (*i.e.*, contracts obligating the traders to buy commodities) when the Commission declared an emergency in a December 1977 coffee contract. *Compania de Salvadorena* v. *CFTC*, 446 F. Supp. 687 (S.D.N.Y. 1978). Nearly two years later, another suit contesting the same emergency determination was filed by a trader who had held "short" positions (contracts obligating traders to sell commodities). *Equitable Trust Co.* v. *CFTC, supra.* If judicial review of the Commission's emergency order were available, the court in *Equitable Trust* would have required the Commission in late 1979 to adduce economic evidence demonstrating the existence of an emergency in December 1977. And if the district court had disagreed with the Commission's conclusion, countless traders whose contracts were liquidated two years previously could have been affected.

would inevitably disrupt the futures markets themselves. Traders would be forced to speculate on the outcome of a legal challenge to the Commission's action rather than basing their trading decisions upon economic factors. As this Court emphasized in *Southern Ry.* v. *Seaboard Allied Milling Corp., supra,* 442 U.S. at 457, "[t]he disruptive practical consequences of such a determination confirm our view that Congress intended no such result."

A determination under Section 8a(9) that a threat of market manipulation is present and that protective measures should be taken requires both consideration of complex economic factors and swift remedial action. If judicial review were available, however, the district court might seek to preserve the status quo and stay the Commission's emergency order. This would result in "the public [being] denied the speedy protection which Congress provided." *Ewing* v. *Mytinger & Casselberry, supra,* 339 U.S. at 601. And, even absent a stay order, "this allowance for independent judicial appraisal of the reasonableness" of the Commission's economic evaluation would constitute a "judicially created 'hazard to uniformity'" (*Southern Ry.* v. *Seaboard Allied Milling Corp., supra,* 442 U.S. at 460) that would

undermine the congressional purpose in empowering the agency to take definitive emergency action to protect the marketplace.[9]

3. Petitioner also argues (Pet. 13-15) that the Commission's exercise of its powers under Section 8a(9) violated the Due Process Clause because it resulted in a deprivation of property without an opportunity for a hearing. Petitioner did not raise this allegation in its complaint in the district court and it was not discussed by the court of appeals. Under these circumstances, review of the question by this Court would not be appropriate. *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

In any event, petitioner's constitutional attack is without merit. There is no substance to the claim that petition was denied a "hearing." The Commission specifically and repeatedly invited any person to submit comments or arguments concerning its emergency orders and announced that a prompt hearing would be afforded on request (Pet. App. A28, A30). Petitioner, however, deliberately failed to exhaust its

[9] In March 1979 Congress was extensively briefed on the Commission's interpretation that its emergency orders are not judicially reviewable. *Hearing on March Wheat Futures Trading on Chicago Board of Trade Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 96th Cong., 1st Sess. 32-34 (1979). Since that time, Congress has not indicated any disagreement with the Commission's interpretation of the statute that it enforces. Cf. *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974).

administrative remedies. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

Furthermore, petitioner has failed to show that any liberty or property interest cognizable under the Due Process Clause was impaired by the Commission's order.[10] Unless contract law or federal statute provides a "legitimate entitlement" to, or "statutory expectancy" of, a property or liberty interest, the requirements of the Due Process Clause do not attach. See, *e.g.*, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972). Here, as petitioner concedes (Pet. 13), any entitlement it might have was "granted to it and its members under the Commodity Exchange Act." The statute does not provide petitioner or any of its members with a statutory expectation that trading in a particular futures contract will always be permitted until the expiration of the contract. Section 8a(9) unequivocally confers on the Commission authority to direct contract markets to take any action, including suspension or termination of trading, "as, in the Commission's judgment," is necessary to maintain or restore orderly

[10] Petitioner has not demonstrated that it suffered any economic harm as a result of the Commission's order and has not shown that it has standing to invoke a due process claim on behalf of its members. Petitioner's members include hedgers and speculators as well as long and short investors, who have diverse positions and interests. Such persons would be affected differently by any emergency order.

trading.[11] Indeed, under petitioner's own rules its members have no entitlement to trade if petitioner declares an emergency and terminates trading.[12]

Finally, even if petitioner had properly raised its due process claim in the lower courts and had asserted some statutory entitlement and deprivation of liberty or property, the balance struck by the Due Process Clause would fall in favor of the Commission in this case. See *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). The governmental interest involved here is the prevention of disruption and manipulation of the commodities futures markets. The importance of that function is well recognized. See Section 3 of the Act, 7 U.S.C. 5; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 40 (1923) ("manipulation of the market for futures on the Chicago Board of Trade * * * is a constantly possible danger"). The public interest in stable market conditions outweighs any private interest of petitioner and individual members in continued trading of a particular contract. Accordingly, the Commission's invitation to affected persons to

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[11] In any event, an emergency order of the Commission does not "take" property from any trader. The Commission does not seize the property of any trader or suspend any license. The Commission merely directs the market to take corrective steps needed to ameliorate emergency conditions.

[12] Petitioner has periodically invoked its emergency rules to suspend and otherwise affect trading in futures contracts. See *Lagorio* v. *Board of Trade of City of Chicago*, 529 F.2d 1290, 1292 (7th Cir. 1976); *Case & Co.* v. *Board of Trade of City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975).

submit comments or arguments concerning its emergency orders (an invitation that petitioner ignored) provided the process that was due.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] Moreover, to the extent that "[e]xecutive discretion is not limited, there is no need for a hearing." *Arnett* v. *Kennedy*, 416 U.S. 134, 181-182 (1974) (White, J., concurring in part and dissenting in part) (collecting cases). Since the Commission's discretion in invoking Section 8a(9) is not limited, a hearing on its decision is not required. Of course, as the court of appeals recognized (Pet. App. A9 n.6), to the extent that Commission action has not been committed to agency discretion by law, judicial review and a hearing are available. See generally *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 303-304 (2d Cir. 1971).

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